



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 13, 1995

Mr. Robert J. Young
Dallas County Community College District
R. L. Thornton, Jr. Building
701 Elm Street
Room 400
Dallas, Texas 75202-3299

OR95-1402

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. We assigned your request ID# 31556.

The Dallas County Community College District (the "district") has received two requests for information relating to a contract awarded for book services. In her first request, the requestor seeks a copy of the original bids and a copy of the contract.¹ You state that because one of the proposals was marked "proprietary and confidential," that party may wish to claim that sections 552.104 and 552.110 except its proposal from disclosure.² You assert no other exception to the first request. Therefore, we assume that the district has released the requested information to the requestor with the exception of this one proposal.

In her second request, the requestor seeks "the original teacher's copy of these Government Documents" and "the original paper document of all book order information from teachers." We have received contradictory statements as to whether the requested information exists. We cannot resolve factual disputes. As to the request for the original teacher's copy of the government documents, you state that the only responsive

¹The requestor also seeks "[a] return of my \$70,000 certified check." This request does not appear to be a request for information under the Open Records Act; consequently, we do not address it here. See Gov't Code § 552.306 (authority of attorney general to render open records decisions).

²We note that neither the district nor the third-party claimed that section 552.104 excepts the requested information from disclosure.

documents are jotted notes from faculty that were discarded after entering the information into the computer. As to the second request for the original paper book order information from teachers, you state that "[t]he information requested is either not in existence or is being accumulated in the computer system to create a book order report for distribution on March 14." We note that a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990) at 8. If the district holds information from which the requested information can be obtained, the district must provide that information to the requestor. The documents that were being entered into the computer may have been in "active use" at the time the request was received. Although information may be withheld if it is in immediate active use, this simply permits a governmental body to avoid unreasonable disruption of its immediate business by scheduling a more convenient, but reasonable, time to provide the information. Open Records Decision No. 148 (1976), 121 (1976). After the information is no longer in active use, the information must be released to the requestor unless an exception to disclosure applies. The district has not claimed any exception to disclosure for this information; therefore, if the information exists, the district must release it to the requestor.³

Pursuant to section 552.305 of the Government Code, we notified the party whose proprietary interests are implicated by the first request. We received a response from attorneys representing Barnes & Noble Bookstores, Inc. ("Barnes & Noble"). Barnes & Noble seeks to withhold the entire format of its proposal and the sections of its proposal titled "Renovations," "Book Merchandising," "Non-Book Merchandising," and "Operating Policies" under section 552.110 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting trade secrets from required public disclosure.⁴ The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain

³We have also received copies of other requests for information from this requestor to the district. The district submitted requests dated March 7, 1995, and March 15, 1995, from the requestor. The district states that the information requested in the March 7 letter was made available to the requestor on March 15, 1995. The March 15 request for the "original copy of the textbook orders for Richland and Eastfield," appears to be the same information that is the subject of this ruling. The requestor also submitted to this office copies of other requests to the district. As the district has not sought a ruling on these other requests, we assume that the district has released the requested information to the requestor.

⁴Section 552.110 also excepts commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991). However, Barnes & Noble has not claimed that this portion of the exception applies to the requested information. Therefore, we need not address it.

an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.⁵

Barnes & Noble claims that its success is in large part "a result of the format, structure, detail and language used in its comprehensive proposals for on-site campus bookstore services" and that Barnes & Noble specifically includes a "Confidentiality Statement" in each proposal. However, a governmental body cannot make information confidential simply by contracting to do so. Attorney General Opinion JM-672 (1987). Additionally, section 552.022 of the Government Code specifically makes public certain categories of information including

information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body, if the information is not otherwise made confidential by law.

⁵The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

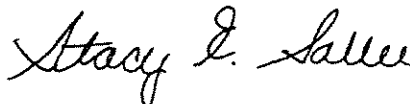
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

Thus, this office has ruled that it is doubtful that the general terms of a contract with a state agency could ever constitute a trade secret. Open Records Decision Nos. 514 (1988), 541 (1990). With the possible exception of the four specific sections of the proposal, we conclude that the entire format of the proposal is not a trade secret. For example, resumes of key personnel are not the type of information that falls within the definition of a "trade secret." Therefore, the district may not withhold the entire Barnes & Noble proposal under section 552.110.

We also conclude that Barnes & Noble has not made a prima facie case that the particular sections of its proposal for which it claims an exception are trade secrets. We note that to be a trade secret, the information must not be commonly known in the industry or readily ascertainable. *Gonzales v. Zamora*, 791 S.W.2d 258, 264 (Tex. App.-Corpus Christi 1990, no writ); *Zoecon Industries v. American Stockman Tag Co.*, 713 F.2d 1174, 1178 (5th Cir. 1983) (applying Texas law). The information contained in the "Renovations" section of the proposal can be readily ascertained by anyone walking into a Barnes & Noble bookstore and observing the layout of the store. Similarly, much of the information in the other sections is tailored especially for this proposal and is a "single or ephemeral event" rather than something that is for "continuous use in the operation of the business." Barnes & Noble has not made a prima facie case that the remainder of these four sections are "trade secrets." Therefore, the district may not withhold Barnes & Noble's proposal under section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 31556

Enclosures: Submitted documents

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